IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV 1106 of 2022

B E T W E E N:

VIVIEN JIT SIEN YAP

First Plaintiff

and

EMPIRE SONS (AUSTRALIA) PTY LTD T/AS RAY WHITE (DALKEITH CLAREMONT) (ACN 604 259 145)

Second Plaintiff

and

SANDI MATIC

Defendant

PLAINTIFFS' SUBMISSIONS
IN SUPPORT OF CONTINUATION OF INTERIM INJUNCTION
DATED 30 MARCH 2022

Allocated Judge:	The Honourable Justice Solomon
Date of Document:	30 March 2022
Filed on behalf of:	The Plaintiff
Date of Filing:	30 March 2022

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Introduction

1 In proceedings regarding tortious acts (and in particular, defamation proceedings), the Court has demonstrated a willingness to restrain a defendant from engaging in conduct that has the 'flavour of a vendetta against the plaintiff'.[1]

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Via eLodgment
CENTRAL OFFICE
SUPREME COURT

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[1] See, for example, *Agustin-Bunch v Smith* [2021] VSC 158 [95].

2 By writ of summons dated 10 February 2022, the first plaintiff (**Ms Yap**) and the second plaintiff (**Ray White**) commenced proceedings to restrain the defendant (**Mr Matic**) from carrying out threatened 'vendetta-like'[2] conduct.

3 At the hearing before his Honour Justice Solomon on 12 April 2022, the plaintiffs will ask the Court to maintain the operation of the orders made on 11 February 2022 until the date of the final hearing in this matter.

Evidence

4 The following evidence has been filed on behalf of the plaintiffs and will be read in support of the application:

4.1 Affidavit of Vivien Jit Sien Yap sworn 11 February 2022 (**First Yap Affidavit**);

4.2 Second Affidavit of Vivien Jit Sien Yap sworn 25 March 2022 (**Second Yap Affidavit**);

4.3 Affidavit of Angus Jonathon Bruce Mead sworn 18 February 2022 (**First Mead Affidavit**);

4.4 Second Affidavit of Angus Jonathon Bruce Mead sworn 28 March 2022 (**Second Mead Affidavit**);

4.5 Second Affidavit of Jessica Louise Border affirmed 22 March 2022 (**Second Border Affidavit**);

4.6 Third Affidavit of Jessica Louise Border affirmed 22 March 2022 (**Third Border Affidavit**);

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[2] *Thunder Studios Inc (California) v Kazal (No 12)* [2022] FCA 110 [365] (Rares J).

4.7 Fourth Affidavit of Jessica Louise Border affirmed 30 March 2022 (**Fourth Border Affidavit**); and

4.8 Affidavit of Lee Ann Fitzgerald sworn 30 March 2022 (**Fitzgerald Affidavit**).

5 Mr Matic relies on his affidavit affirmed on 2 March 2022 (**Matic Affidavit**).

Factual background

6 In June 2021 Ms Yap met with Mr Matic and Ms Matic (**Sellers**) in relation to the sale of their property at 17 Biara Gardens, Mount Claremont (**Property**).[3]

7 On 4 September 2021, following a sales campaign that was discussed with the Sellers, the Property was auctioned. The reserve price was not met at the auction, and the Property was passed in.[4]

8 Subsequently, on 17 September 2021, Ms Yap and Ms Lee Fitzgerald of Ray White met with the Sellers to discuss offers that had been placed by potential buyers of the Property.[5]

9 On around 19 September 2021, the Sellers accepted an offer for the purchase of the Property.[6]

10 After the contract of sale was signed by each of the Sellers, Mr Matic raised complaints with Ray White in relation to Ms Yap's conduct during the sale of the Property. The complaints included allegations that Ms Yap and other employees or agents of Ray White had breached the agency, engaged in negligent conduct, engaged in illegal conduct, and acted incompetently.[7]

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[3] First Yap Affidavit [7] - [12].
[4] First Yap Affidavit [26].
[5] First Yap Affidavit [34] - [36].
[6] First Yap Affidavit [36].
[7] First Yap Affidavit, VJSY-2 pages 26 - 30.

11 On 23 December 2021, Ms Lee Fitzgerald of Ray White emailed Mr Matic and offered to discuss Mr Matic's complaints in person.[8]

12 In December 2021, Mr Matic posted a critical Google review of Ray White.[9] The Google review accused Ms Yap and Ray White of misrepresenting the Sellers, underquoting the property, and misleading prospective purchasers.

The threatened conduct

13 On 31 January and 1 February 2022, Mr Matic spoke with Mr Angus Mead, National Relationship Manager, of Ray White Corporate. During those conversations, Mr Matic made statements concerning Ms Yap.[10]

14 Mr Mead wrote a letter to Ms Yap dated 1 February 2022 that recorded his recollection of the statements made by Mr Matic during the conversations. Mr Mead's letter to Ms Yap records that on 31 January 2022 Mr Matic stated:[11]

14.1 *"I am going to put billboards up all around Perth to let everyone know how terrible Vivien is."*

14.2 *"I am going to make Vivien feel the pain I currently feel."*

14.3 *"There is nothing Vivien can offer me to make this right."*

15 Mr Mead's letter to Ms Yap further records that on 1 February 2022 Mr Matic stated:[12]

15.1 *"I am going to make Vivien feel the pain I am feeling."*

15.2 *"I am going to follow Vivien around to every open home she attends."*

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[8] First Yap Affidavit, VJSY-2 page 24.
[9] First Yap Affidavit, VJSY-3 page 34.
[10] First Mead Affidavit, AJBM-1 and AJBM-2.
[11] First Mead Affidavit, AJBM-1 and AJBM-2.
[12] First Mead Affidavit, AJBM-1 and AJBM-2.

15.3 *"Vivien has ruined my life and now I want to ruin hers."*

15.4 *"I do not care what the consequences are, I do not care if you involve the police, I have nothing to lose."*

16 Mr Mead confirms the truth of his correspondence and his recollection of the contents of those calls.[13]

17 Ms Yap subsequently reported Mr Matic's threats to the police.[14]

18 On 4 March 2022, Mr Matic sent an email to Ms Fitzgerald and Mr Mead which contained queries about another property sold by Ray White in respect of which Mr Matic had no legitimate interest.[15]

19 Subsequently, during a pre-settlement inspection held on 14 March 2022, Mr Matic handed a printed copy of the email to Ms Fitzgerald and asked whether Ms Fitzgerald intended to respond to the queries before he took the matter to the press.[16]

20 On 15 March 2022, Bennett + Co informed Mr Matic that threatening to take the 4 March 2022 email to the press was a threat to defame.[17]

21 In response, Mr Matic made a number of allegations against Ms Yap and Ray White, and stated:[18]

> *'I am prepared to risk it all & lose everything I've got to see this through right to the end even if it means that it will all be to me [sic] detriment.'*

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[13] First Mead Affidavit [7] - [8].
[14] First Yap Affidavit [44].
[15] Fitzgerald Affidavit, LAF-1.
[16] Fitzgerald Affidavit [13].
[17] Third Border Affidavit, JLB-1.
[18] Third Border Affidavit, JLB-2.

22 On 24 March 2022 Ms Fitzgerald sent the Sellers an email in relation to the handover of the Property to the purchaser. On the same day, Mr Matic responded to Ms Fitzgerald in a hostile manner, and stated 'you might have to get the authorities involved'.[19]

Legal principles

23 The plaintiffs sought that the Court grant *quia timet* injunctive relief to restrain Mr Matic from carrying out the threatened behaviour.

24 In order to be granted *quia timet* relief (and to maintain it), the plaintiffs must show that what Mr Matic intends or is likely to do will cause immediate and substantial damage.[20]

25 A helpful summary of the relevant principles was set out by her Honour Justice Bennett in *Apotex Pty Ltd v Les Laboratories Servier (No 2)*:[21]

25.1 A quia timet injunction is granted to prevent a threatened infringement of the rights of the applicant. The applicant must show that what the respondent is threatening and intending to do will cause imminent and substantial damage to the applicant.

25.2 The word "imminent" means that the injunction must not be granted prematurely. The degree of probability of future injury is not an absolute standard. What is to be aimed at is justice between the parties, having regard to all the relevant circumstances. However, this is not to be taken as conveying that future injury need not be shown to be likely at all.

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[19] Fitzgerald Affidavit, LAF-2.
[20] *Rasco Pty Ltd v Lucas* [2017] VSC 703 [84].
[21] *Apotex Pty Ltd v Les Laboratories Servier (No 2)* (2012) 293 ALR 272, 281 - 282.

25.3 Quia timet injunctions are not to be granted unless the imminence of the act to be prohibited is sufficiently clearly established to justify the court's intervention.

25.4 In deciding whether to grant a quia timet injunction, the court will have regard to the degree of probability of the apprehended injury, the degree of seriousness of the injury and the requirements of justice between the parties.

The Court should treat Mr Matic's evidence with caution

26 The plaintiffs submit the Court should exercise caution when considering whether to accept Mr Matic's evidence.

31 January conversation

27 Mr Matic purports to attach to the Matic Affidavit a transcript of the telephone conversation that occurred between himself and Mr Mead on 31 January 2022.[22]

28 Mr Mead has given responsive evidence on oath that the transcript is not a truly accurate record of the conversation, as:[23]

28.1 the statements recorded in Mr Mead's letter to Ms Yap on 1 February 2022 are not included; and

28.2 the transcript does not reflect the use of profanity by Mr Matic throughout the conversation which Mr Mead recalls.

29 The plaintiffs have been unable to verify the accuracy of the transcript, as Mr Matic has refused, despite request, to provide a copy of the recording.[24]

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[22] Matic Affidavit, SM-1.
[23] Second Mead Affidavit [7] - [9].
[24] Fourth Border Affidavit [11].

30 The plaintiffs submit that the transcript of the 31 January 2022 call is not an accurate reflection of the conversation that occurred. Alternatively, there is a serious question to be tried as to whether the recording is complete and genuine.

Omissions

31 At paragraphs 44 to 46 of the Matic Affidavit, Mr Matic deposes that he called Mr Mead on 1 February and that the call went to voicemail. Mr Matic then attaches his phone bill and refers to the 19 second call.[25]

32 Mr Matic has neglected to disclose the fact that Mr Mead returned his call on 1 February 2022. The call went for 4 minutes and 21 seconds.[26]

33 The plaintiffs submit that Mr Matic has intentionally omitted the fact that Mr Mead returned his call, in an attempt to mislead the Court.

34 Further, Mr Matic has not provided a transcript, or any evidence about the substance of the 1 February 2022 telephone conversation. This is notwithstanding the fact that during the 31 January 2022 conversation, Mr Matic's transcript records him having said:[27]

> *I mean, uhh uhh just, just to give you, I guess, uhh a courtesy –* ***my phone records, every single conversation I make*** *about, by default automatically.*

35 On the basis of Mr Matic's refusal to provide a copy of the recording to the plaintiffs' solicitors, failure to depose to the 1 February 2022 conversation, and omission of the use of profanity, the Court should treat Mr Matic's evidence with caution.

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[25] Matic Affidavit [43] - [47].
[26] Second Mead Affidavit, ABJM-1, page 14.
[27] Matic Affidavit, SM-1, page 8.

Mr Matic is likely to act on the threats

36 Mr Matic's desire to 'ruin' Ms Yap appears to stem from his perception that Ms Yap and Ray White's sales strategy 'essentially cost [him his] marriage and [his] whole life'.[28]

37 Mr Matic's escalating behaviour demonstrates an intention to carry out the threatened conduct.

38 Mr Matic has already demonstrated his willingness to pursue a public smear campaign against Ms Yap and Ray White by posting the Google review on the Ray White page in December of 2021.[29]

39 Mr Matic further evidenced his intention to harm Ms Yap and Ray White when he made the threats about Ms Yap to Mr Mead. By his own evidence, Mr Matic admits to making the threats to advertise around the western suburbs.[30]

40 Further and in spite of the Court's orders, Mr Matic has continued to make frequent and ongoing threats. By way of example, at the pre-settlement inspection on 14 March 2022, Mr Matic threatened to take allegations about Ms Yap and Ray White, on an entirely unrelated matter, to the press.[31]

41 It is submitted that the proof of actual breach of an interim order may give rise to an apprehension that similar breaches will subsequently follow or that a statement of intention to harm should be accorded weight.[32]

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[28] Matic Affidavit, SM-1, page 7.
[29] First Yap Affidavit, VJSY-3 page 34.
[30] Matic Affidavit, SM-1, page 7.
[31] Fitzgerald Affidavit [13].
[32] *Apotex Pty Ltd v Les Laboratories Servier (No 2)* (2012) 293 ALR 272 [52] citing I C F Spry The Principle of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages (8th ed, Law Book Co, NSW, 2010).

42 Mr Matic has demonstrated a concerning disregard for the consequences of his actions. In his conversation with Mr Mead on 1 February 2022, Mr Matic stated '*I do not care what the consequences are, I do not care if you involve the police, I have nothing to lose'*.[33] This statement is consistent with Mr Matic's email to Ms Fitzgerald, in which he states, 'you might have to get the authorities involved'.[34] Further, in an email to Mr Bennett dated 16 March 2022, Mr Matic stated he was 'prepared to risk it all and lose everything'.[35]

43 The totality of Mr Matic's behaviour to this point in time should persuade the Court that there is a serious question to be tried that he will, in fact, pursue and carry out the actions that he has threatened to commit against Ms Yap and Ray White.

The plaintiffs will suffer significant harm

44 The effects of the threatened conduct cannot be perceived as trivial.

45 Ms Yap is the director of Ray White. She maintains a high profile in the media.[36] She has an extensive network of buyers that she has developed over a number of years.[37] A person driving down Stirling Highway is likely to recognise Ms Yap's photograph on bus stops and billboards. A number of people resident in the western suburbs of Perth would know of Ms Yap.

46 Ms Yap and Ray White accordingly stand to suffer significant economic damage if Mr Matic were to act on his threats.

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[33] First Mead Affidavit, AJBM-1 and AJBM-2.
[34] Fitzgerald Affidavit, LAF-2.
[35] Third Border Affidavit, JLB-2.
[36] First Yap Affidavit [51].
[37] First Yap Affidavit [47].

47 Separately, Ms Yap is already suffering from, and will continue to suffer, the effects of the threats. Ms Yap has deposed that she has heightened senses, is worried about Mr Matic's conduct, struggles to sleep, and that her life has been irreparably changed.[38]

48 Mr Matic's behaviour has been unrelenting, to the point that Ms Yap now employs a security guard to attend with her at her weekend home opens.[39]

Requirements of justice between the parties; balance of convenience

49 The requirements of justice between the parties favour the continuation of an interlocutory injunction.

50 Mr Matic will not suffer any apparent prejudice by the extension of the injunction to trial. Mr Matic is entitled to make the complaints or commence the proceedings he has foreshadowed[40] pursuant to his belief that the plaintiffs have fabricated fictitious claims in an attempt to 'forfeit' his rights.[41] The imposition of an injunction to restrain the threatened conduct will not impact any of Mr Matic's lawful rights or ability to pursue legal claims against Ms Yap and Ray White.

51 In contrast, the damage likely to be suffered by Ms Yap and Ray White if the injunction is not extended, is significant. In a market where there are unprecedented sales of homes occurring, Ms Yap and Ray White stand to suffer significant losses for the reasons set out above.

52 Further, the harm Ms Yap has already deposed to is significant enough on its own to warrant the grant of injunctive relief.

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[38] Second Yap Affidavit [7].
[39] Second Yap Affidavit [7].
[40] See, for example, First Yap Affidavit, VJSY-2 page 27.
[41] Matic Affidavit [56].

Conclusion

53 On the evidence before the Court, the plaintiffs have demonstrated the continuing imminent probability that Mr Matic will carry out the threatened conduct. The harm likely to be suffered by Ms Yap and Ray White is sufficiently serious. The balance of convenience favours the grant of injunctive relief in the circumstances of this case.

54 Judicial intervention is warranted in circumstances where Mr Matic's escalating behaviour and utter disregard for Ms Yap's safety, and Ray White's economic interests, is undeniable.

M L Bennett

M L BENNETT
COUNSEL

List of Authorities

Case Authorities

1 *Agustin-Bunch v Smith* [2021] VSC 158

2 *Apotex Pty Ltd v Les Laboratories Servier (No 2)* (2012) 293 ALR 272*

3 *Thunder Studios Inc (California) v Kazal (No 12)* [2022] FCA 110

4 *Rasco Pty Ltd v Lucas* [2017] VSC 703

Other Authorities

5 I C F Spry The Principle of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages (8th ed, Law Book Co, NSW, 2010